But, this fact was not completely overlooked. Judge Wright, in the dissenting opinion filed below, said:

> The charge to the jury given here is more coercive than anything I have heard or read in 25 years of exposure to criminal jury trials. Even the 67-year-old *Allen* charge, now condemned as "the dynamite charge," does not go so far in coercing the jury.

When the charge given in the instant case is compared with *Powell* and *Rogers*, and to the *Allen* case itself, there can be no question that it is far excessive. Clearly, the court below was in error and this case should be reversed on the grounds of the coerciveness of the supplemental charge that was given.

Conclusion

For the foregoing reasons, petitioner urges that the judgment below should be reversed and the case remanded with directions to a judgment of acquittal.

Respectfully submitted.

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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 761

MELVIN C. JENKINS, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The majority (R. 53–54) and dissenting (R. 54–59) opinions in the court of appeals are reported at 330 F. 2d 220. The *per curiam* order of the court of appeals denying a petition for rehearing *en banc*, four judges dissenting (R. 61), is not reported.

JURISDICTION

The judgment of the court of appeals (R. 60) was entered on February 13, 1964. A petition for rehearing *en banc* was denied on April 3, 1964 (R. 61). By order of the Chief Justice, the time for filing a petition for a writ of certiorari was extended to June 3, 1964 (R. 62), and the petition was filed on that date.

The order granting the writ was entered on December 14, 1964 (R. 63; 379 U.S. 944). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Shortly after beginning its deliberations, the jury sent a note to the trial judge advising him that it could not arrive at a verdict as to either count of a two-count indictment. In the course of his response, the trial judge stated that the jury had to reach a decision in the case. No objection was made to this statement. The questions presented are:

1. Whether, in its context and under all the circumstances, the statement was coercive, so as to require reversal of the jury's verdict of guilty on one of the counts; and

2. Whether there is any occasion for the Court to reexamine in this case the validity of the so-called *Allen* charge (approved in *Allen* v. *United States*, 164 U.S. 492), it appearing (a) that the trial judge did not purport to give that charge and (b) that the *Allen* charge differs materially from the statement of the trial judge now under review.

STATEMENT

Petitioner was charged in a two-count indictment, returned February 25, 1963, in the United States District Court for the District of Columbia, with robbing a High's Dairy Products store on December 27, 1962 (count 1), and with assault with intent to rob upon the proprietress of a grocery store on January 24, 1963 (count 2), in violation of §§ 22–2901 and 22–501,

respectively, of the District of Columbia Code (R. 42, 54). Following a trial by jury, he was found guilty on count 1 and not guilty on count 2 (R. 52). He was sentenced to imprisonment for from three to ten years (R. 54). The court of appeals affirmed the conviction, one judge dissenting (R. 60). A petition for rehearing *en banc* was denied, four judges dissenting (R. 61).

The relevant facts are as follows:

THE EVIDENCE ON COUNT 1

At approximately 6:45 p.m. on December 27, 1962, Ruth Hodges, the manager of a High's Dairy Products store in Northeast Washington, was held up by a man armed with a pistol and robbed of the contents of the store's cash register (R. 16–22). Both Miss Hodges and Mrs. Ruth McLeish, a sales clerk who was present and witnessed the incident, identified petitioner as the gunman (R. 17, 23).

Mrs. McLeish testified that the holdup occurred moments following her return to the store from a visit to another store in the neighborhood on a personal errand. As she was about to reenter her place of employment, she observed a man—whom she identified as petitioner—standing in front of the store looking up and down the street. Thinking he was a customer, she was about to speak to him as she approached, but as she got closer she saw that he was not a customer, so she continued on into the store without speaking. She was close enough to touch him as she passed (R. 17–18).

A few minutes later (Mrs. McLeish further testified), the man whom she had seen outside the store entered, pointed a gun at Miss Hodges, and demanded the contents of the cash drawer. Miss Hodges opened the register and asked the gunman whether he "want[ed] the change." He said, "No, lady, just the bills." Miss Hodges put the money in a paper bag and delivered it to her assailant, who then fled. During the incident, which lasted between three and five minutes, Mrs. McLeish had the opportunity to observe the robber's unmasked face at close range. She testified that, throughout the proceedings, she "didn't say anything, didn't do anything. I just looked at him"—from a distance of a few feet (R. 18–20).

Aside from unproductive cross-examination, the defense made no attempt to shake or impeach Mrs. McLeish's identification of petitioner as the holdup man.

Miss Hodges also identified petitioner as the gunman (R. 23). Her testimony, however, was somewhat weakened by cross-examination attempting to establish that she had earlier told an investigator for the Legal Aid Agency (Mr. Savage) that she could not identify the holdup man. After some wavering as to her memory of the event and the content of the conversation with Mr. Savage, Miss Hodges denied that she had told Savage that she could not identify the defendant as the holdup man (R. 24–31). Mr. Savage then testified that Miss Hodges had told him by telephone that she "was not able to identify the man" (R. 32–33).

Petitioner, testifying in his own behalf, denied committing the robbery (R. 36–37). He acknowledged that he knew the location of the store, that he had been in it on other occasions, and that he had been out of work for some time at the time of the holdup (R. 35–37). He could not remember where he had been on the night of the robbery (R. 36).

THE EVIDENCE ON COUNT 2

On January 24, 1963, at about 12:40 p.m., Sophie Korn, the proprietress of Phil's Market, a grocery store located at 301 12th Street, S.E., Washington, D.C., was held up by a lone gunman and directed to turn over the money in the cash register. While Mrs. Korn was putting the money in a bag preparatory to delivering it to her assailant, the gunman, surprised by the sudden entrance of Sophie's husband, Phillip Korn, fled from the premises empty-handed (R. 2–4, 7–8). Both Mrs. Korn and Joseph Davis, Jr., a sales clerk who witnessed the incident, identified petitioner at the trial as the would-be robber (R. 5, 8).

Immediately following the bandit's departure, Mrs. Korn called the police and reported the holdup (R. 4). About five or ten minutes later,[1] petitioner, who had been arrested in the interval a few blocks away (under circumstances related *infra*) was brought to the store in police custody. He was identified at

[1] The elapsed interval was five minutes or less according to Davis (R. 8–9), about ten minutes according to Mrs. Korn (R. 4).

the scene by Mrs. Korn and Davis as the man who had just held them up (R. 4–5, 8, 9, 11–13).

Although Mrs. Korn and Davis positively identified petitioner (both at the trial and at the scene) as the would-be robber, each testified that the holdup man was wearing a different type of coat from that which petitioner was wearing when he was brought to the store in the custody of the police (R. 6, 8, 9). Mrs. Korn described the garment worn by the gunman as "a three-quarter coat," whereas the coat which petitioner had on when he was brought to the store was, in her words, a "short, hip length" coat. She was "positive" that the coats were different (R. 6). Davis also testified that the coat worn by the bandit "reached down to his knees," whereas petitioner, when brought to the store, was wearing a "shorter coat," or "jacket" (R. 8, 9).

Phillip Korn (who was called as a defense witness) gave similar testimony. He testified that the man whom the police brought to the store (petitioner) "wore a different coat" from that worn by the holdup man (R. 27). Korn further testified that when the arresting officer, Jerome Demoro, asked him at the store (immediately following petitioner's arrest) whether he could identify petitioner as the culprit, he stated that he could not, and remarked to the officer that the holdup man "wore a long overcoat" (R. 28).

Officer Demoro testified that, when arrested, petitioner was in fact wearing "a suede leather jacket with a zipper front" and that "it was a waist-length jacket" (R. 14).

The circumstances of petitioner's arrest, as related by Officer Demoro, were as follows: At approximately 12:40 p.m. on the day of the holdup, Demoro and a fellow officer, in plain clothes and traveling in an unmarked vehicle, were cruising in the vicinity of the 19th and C Streets, N.E., when they received a radio report of the attempted robbery. They proceeded immediately to the intersection of East Capitol and 12th Streets, N.E., on the northeast side of Lincoln Park, where they parked their vehicle. Within a few minutes they observed petitioner walking "north towards 12th Street," approximately 20 feet inside the park. Petitioner "showed signs of breathing heavy," and there was "vapor coming from his mouth, as though he had been running." He "seemed very nervous" and "kept looking back." Crossing East Capitol Street, directly in front of the officers' car, he continued north on 12th Street to an alley connecting 11th and 12th Streets, roughly 300 feet north of East Capitol. Commencing to run at this time, petitioner turned into the alley for a distance of approximately 20 feet. At this point he reversed his direction and backtracked three or four steps towards 12th Street. Then, again reversing his direction, he continued running towards 11th Street. The officers, who had in the meantime begun to give chase in their automobile, arrested petitioner just as he reached 11th Street (R. 11–15). As the officers jumped from their vehicle, they shouted "police" at petitioner, who stopped, turned towards the officers, and "threw both arms straight out." An on-the-spot search was made of petitioner's person for a weapon or weapons, but none

was discovered (R. 13, 15). The officers then took petitioner to the scene of the holdup (R. 13).

Petitioner testified that he did not commit the crime in issue and denied having a gun in his possession at any time on the day of the offense (R. 34–35). He testified that at the time of his arrest he was on his way from his home, located at 1240 11th Street, S.E., to the home of a girl friend, on 10th Street (apparently N.E.) (R. 34, 40). He denied that he started to run as he was in the alley between 11th and 12th Streets, as related by Officer Demoro (R. 39). He admitted reversing and then re-reversing his direction in the alley, as attested by the officer, explaining that this action was due to indecision on his part whether to continue on to his girl friend's house (his original destination) or to go to the home of a cousin, on 15th Street (apparently N.E.) (R. 40–41).

THE CHALLENGED SUPPLEMENTAL INSTRUCTION

After the trial court gave its principal instructions (R. 42–48), the jury retired to deliberate at 2:22 p.m. on May 27, 1963 (R. 48). Slightly more than two hours later, at 4:30 p.m., the jury sent a note to the court advising that it had been unable to agree upon a verdict "on both counts because of insufficient evidence" (R. 48). The court thereupon recalled the jury to the courtroom and the following took place (R. 48–49):

> The Court: Mr. Foreman, the Court has received your note reading as follows:
>
> "The jury cannot come to a decision on both counts because of insufficient evidence."

Well, you have all the evidence there is, all the evidence that anybody can have. That is what we have jurors for, to decide on the evidence. If there weren't any problems we wouldn't have a jury.

Now, I am not going to accept this. You have got to reach a decision in this case.

You may resume your seat, Mr. Foreman.

Of course, every case involves a problem and you have got to weigh the evidence and reach a conclusion. That is what you are jurors for.

Now, I am going to let you go home at this time. Each of you think it over overnight and I am going to ask you to be back here by 10 o'clock tomorrow morning and resume your deliberations. Now, from the moment you leave the jury box until you return tomorrow morning at 10 o'clock to resume your deliberations, please don't discuss this case with anyone, not even amongst yourselves, not even at home with members of your families. Each of you can individually think about it, but don't discuss it and don't let anybody talk to you about it. Perhaps after you have had a good rest overnight you will be in a position to reach a verdict.

It is a simple case. We have cases that are much harder than this one that juries decide. As I say, if cases were open and shut we wouldn't need any juries.

I am going to excuse you at this time and please be back in the jury room a few minutes before 10 o'clock tomorrow morning and then resume your deliberations because this case has to be decided. That is all the evidence there is, that is all the evidence anybody can have.

> If I excuse you we have to try the case again with some other jury and they will have the same evidence. Now that would not be very sensible, would it. So, you will be excused at this time, ladies and gentlemen of the jury. I know that you will reach a decision tomorrow after you think about it overnight.

The jury was thereupon, at 4:35 p.m., dismissed for the day (R. 49). The defense made no objection, then or later, to the foregoing remarks.

COUNSEL'S REQUESTED ADDITIONAL INSTRUCTION

At 10 o'clock on the following morning, May 28, counsel for petitioner, referring to the jury's note of the previous afternoon, advised the court that he had prepared a "proposed instruction in response to" the note, which he asked the court to give (R. 50). The proposed instruction, which is not contained among the papers certified to this Court, but may be found among the original papers on file in the district court (Cr. No. 208–63), was as follows:

> You are instructed that if you find there to be insufficient evidence to find the defendant guilty beyond a reasonable doubt as to either or both counts in the indictment, then your verdict must be not guilty as to either or both counts.

The court, stating that it did not propose to give the jury any additional instructions at that time, denied counsel's request (R. 50).

THE JURY'S FINAL DELIBERATIONS AND VERDICT

The jury thereupon resumed its deliberations. About an hour later, at 11 a.m., it sent another note to the court, in which it "request[ed] the testimony of Ruth Hodges" (R. 50–51). At the court's direction, the court reporter read to the jury the entire testimony of that witness (see *supra*, p. 4) (R. 51). The jury then once again retired to deliberate, and at 2:20 p.m., approximately three hours later,[2] returned its verdict (R. 52).

SUMMARY OF ARGUMENT

I

A. The instruction that the jury "have got" to reach a decision was not coercive in its context, and did not in fact result in a compelled verdict.

1. The jury knew that the instruction was not meant to be taken literally, since the judge referred explicitly to the possibility that he might finally be required to discharge them without a verdict. The judge did not intimate what he thought the verdict should be, made no attempt to determine how the jurors were divided, and did not suggest that those in the minority should pay special heed to the majority's views. He did not suggest that any juror was being obstinate, or that any should surrender

[2] The record does not reflect precisely how much of this three-hour period (during part of which the jury presumably was at lunch) was spent in actual deliberation.

a conscientious conviction, nor did he compel the jurors to continue their deliberations into the evening hours.

2. That the verdict was the product of reasoned argument, not coercion, is further indicated by the fact that the jury deliberated some three or four hours after reconvening before reaching its verdict. It is especially significant that in the course of the resumed deliberations the jury asked to have read to it, for more careful analysis, the testimony of the government witness whose identification of petitioner as the count-1 gunman the defense had sought to impeach.

3. There is no sound basis for Judge Wright's dissenting suggestion that the verdict, guilty on count 1 and not guilty on count 2, was in all probability a compromise—the coerced finding of jurors who believed themselves bound to bring in some verdict even though they could not agree. Although petitioner was identified by eyewitnesses as the perpetrator of both of the crimes charged, the greater basis for a reasonable doubt as to his guilt on count 2 can be clearly seen, even from the cold record.

B. Reversal would be particularly unwarranted in view of petitioner's failure to object to the instruction at the trial. If petitioner had seasonably objected, the judge would have had an opportunity to amend the instruction to meet counsel's criticism. Thus the rationale of Rule 30 of the Federal Rules of Criminal Procedure, requiring that objection be made as a condition of the right to assign any portion of

the charge as error, weighs heavily against petitioner in his present untimely challenge.

Nor should the rule of "plain error" be applicable here. When the jury reported that it could not agree, defense counsel may well have regarded the development as highly encouraging—an indication that a favorable outcome was at least more likely than a verdict of guilt. A "hung" jury, on the other hand, would have meant a second trial, which might easily go worse for the defense than the first. One can hardly conclude, in these circumstances, that counsel's failure to object was due to lack of alertness. The more likely explanation, we suggest, was that counsel, anticipating a favorable verdict on both counts, did not wish to jeopardize this outcome by requesting amended instructions calculated to increase the likelihood of a "hung" jury. An accused who has thus taken his chances on a favorable verdict should not be permitted, when the decision proves not wholly to his liking, to demand a new trial (as to the part of the verdict which is adverse) on the basis of an error in the instructions which would have been readily correctible had it been complained of at the time.

II

There is no occasion for the Court in this case to reexamine the validity of the so-called *Allen* charge (*Allen* v. *United States*, 164 U.S. 492, 501–502). For the statements of the trial court here in issue did not in any way purport to be the *Allen* charge, and comparison shows that the remarks have little in common

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with that classic instruction. At all events, the *Allen* instruction, in the carefully phrased form in which it received this Court's unanimous approval and has since been twice reaffirmed (most recently in 1952), is a suitable method, when used in proper circumstances and in the sound discretion of the trial court, for reminding jurors of their duty to decide the case before them if it is possible to do so consistently with their conscientious convictions.

ARGUMENT

I

THE INSTRUCTION THAT THE JURY "HAVE GOT" TO REACH A DECISION WAS NOT COERCIVE. IN ITS CONTEXT AND NOT HAVING BEEN OBJECTED TO, DOES NOT WARRANT REVERSAL

Petitioner, stressing that the trial judge told the jury that they "have got to reach a decision in this case," urges that the resulting verdict was coerced (Pet. Br. 17–20). Of course, if this Court should conclude that the judge's statement had the coercive effect attributed to it, the judgment should be reversed and the cause remanded for a new trial;[3] the principle that jurors may not be coerced into surrendering views conscientiously held is so clear as to require no elaboration. See *Brasfield* v. *United States*, 272 U.S. 448, 450; *Burton* v. *United States*, 196 U.S. 283, 307–308; *United States* v. *Rogers*, 289 F. 2d 433, 435 (C.A. 4):

[3] Petitioner's unexplained suggestion that a "judgment of acquittal" should be entered (Pet. Br. 20) is plainly unsound. Cf. *United States* v. *Fateo*, 377 U.S. 463.

We do not agree, however, that the judge's remarks were coercive, when viewed in their context, nor that the verdict was in fact the product of improper compulsion. It is undisputed, moreover, that the statements were not objected to at the trial—a circumstance which would normally preclude reliance upon them as a basis for reversal. Counsel's failure to object would, of course, pose no obstacle, under the "plain error" principle, to the Court's taking notice of the error, if the coercive character of the statements were indeed that plain; but in attempting to recreate an atmosphere which the reviewing court cannot experience, the failure of counsel to object is properly to be weighed as evidence that he saw nothing coercive in what occurred.[4] At worst, any irregularity was one which could have been promptly corrected had exception been taken.

A. THE INSTRUCTION WAS NOT COERCIVE IN ITS CONTEXT, AND DID NOT IN FACT RESULT IN A COMPELLED VERDICT

The jury's note apprising the judge that it had been unable to arrive at a verdict was sent after it had been deliberating for only slightly longer than two hours (*supra*, p. 8). The judge, in these circumstances, plainly had every reason to believe that the jury had not yet made a sufficiently diligent effort to reach a verdict. He pointed out to them

[4] The court below noted counsel's failure to object, and thought it "significant" that the remarks were being objected to for the first time on appeal. It nevertheless considered the matter, and concluded that, viewed in the context of the whole charge, the challenged statements did not require reversal (R. 53–54).

that they already had all the evidence there was, and that it was their function to decide the case on that evidence. Following the remark now complained of, that the jurors had to reach a decision in the case, he pointed out that "every case involves a problem" and that it is the task of jurors to "weigh the evidence and reach a conclusion." Noting that if he finally discharged them at that time it would be necessary to re-try the case before another jury, which would have "the same evidence"—a course which, the judge said, "would not be very sensible"—he told them that he was going to dismiss them for the day (it was then 4:30 p.m.), that each of them should "think it over overnight," and that they should resume their deliberations the following morning. Following a "good rest overnight," he suggested, they might find themselves capable of arriving at a verdict (*supra,* pp. 8–10).

The jury were accordingly dismissed for the day and resumed their deliberations the following morning at 10 o'clock. At 11 o'clock they called for the testimony of Ruth Hodges, the High's store manager, whose identification of petitioner as the count-1 gunman, though fully corroborated by the testimony of the sales clerk, Mrs. McLeish, had been the subject of impeachment efforts by the defense. Following the reading of Miss Hodges' testimony, the jury again retired to deliberate, and returned their verdict three hours later, at 2:20 p.m. (*supra,* pp. 10–11).

1. Ignoring for the moment the events of the day following the challenged instructions, and looking only at the comments themselves and the immediate cir-

cumstances, we submit that the statements were not coercive in their overall impact.

That the jury could not literally have understood that they were bound to return a verdict at all events, regardless of whether they could reconcile their views, is apparent from the fact that the judge referred explicitly to the possibility that he might finally be required to discharge them without a verdict. In that event, as he explained it would be necessary to re-try the case before another jury. The jurors were thus fully aware that the statement that they "have got" to reach a decision was not to be taken literally, and that all the judge really meant was that they should make a renewed and determined effort to achieve agreement after the refreshment of a night's sleep.

We point out also that the judge in no way intimated what he thought the jury's verdict should be, and made no attempt to determine how the jurors were divided. Cf. *Brasfield* v. *United States,* 272 U.S. 448; *Burton* v. *United States,* 196 U.S. 283, 307–308. Neither was there any suggestion that the jurors in the minority should acquiesce in, or pay special heed to, the views of the majority, or that any juror was being obstinate, or that any should modify his convictions or surrender a conscientiously held view. This was not a case, moreover, in which the judge summoned the jury from their deliberations and demanded to know the cause of their delay in reaching agreement—a procedure which the jury might reasonably have construed as evidencing judicial impa-

tience with their slowness. Here the initiative in reporting the impasse came entirely from the jurors themselves.

Most important, the judge did not compel the jurors to continue their deliberations into the evening hours, or beyond the normal time for recessing for the day. He permitted them to adjourn at a plainly reasonable hour and to reconvene the following morning, when they would be refreshed and relaxed. Thus the present case presents none of the aspects of a case in which deadlocked jurors have been required to sit far into the night, under conditions suggesting that the verdict was more probably the fruit of physical exhaustion than a true concurrence of views freely reached.

2. That the jury was fully aware that it was not required to join in a verdict in the absence of actual agreement is further evidenced by its action on the following day. One would expect a "coerced" jury to return with its compelled verdict relatively promptly. Cf. *Estes* v. *United States,* 335 F.2d 609, 618–619 (C.A. 5), certiorari denied January 18, 1965, No. 601, this Term; *United States* v. *Kahaner,* 317 F. 2d 459, 483–484 (C.A. 2), certiorari denied, 375 U.S. 836; *State* v. *Williams,* 39 N.J. 471, 485 (1963), certiorari denied, 374 U.S. 855. The verdict here was returned at 2:20 p.m. on May 28, more than four hours after the jury's resumption of its deliberations the following morning, and roughly three hours after the reading of Miss Hodges' testimony (*supra,* pp. 10–11). "If the charge can be denominated a 'dynamite'

charge," as the court observed under similar circumstances in the *Estes* case, *supra*, "it appears to have been a dud * * *" (335 F. 2d at 618–619).

The fact that the jury, during its renewed deliberations, requested the reading of the particular testimony it called for is also a convincing indication that the verdict was not compelled. It was Miss Hodges whose identification of petitioner as the gunman in the count-1 robbery the defense had tried to impeach (*supra*, p. 4). The jury's request to have this witness' testimony repeated strongly suggests that its verdict was the product of reasoned argument, not coercion. At all events, there is clearly nothing in the sequence of events following the judge's supplemental instructions which tends in any way to show that the will of any juror was overborne or that any felt constrained to surrender conscientious convictions.

3. Finally, we submit that there is no basis for Judge Wright's dissenting suggestion (R. 56) that the split verdict in this case, guilty on one count and not guilty on the other, was "in all probability" "a compromise"—the coerced finding of jurors who, being unable to agree, believed themselves bound nevertheless to bring in some verdict. There would undoubtedly be some force to the judge's conjecture if the evidence on each of the two counts were roughly equivalent in its probative force—so that no rational reason could be seen for the difference in the jury's findings. This verdict, on the contrary, is plainly a reasonable one, and contains no hint that it was the

fruit of compromise, enforced or otherwise. Although petitioner was identified by eyewitnesses as the perpetrator of both of the crimes charged in the indictment, the basis for the reasonable doubt presumably generated in the minds of the jurors in respect of count 2 can be clearly seen, even from the cold record.

Unlike count 1—as to which there was no circumstantial evidence whatever to cast doubt on the eyewitness identification of petitioner as the High's store robber (*supra,* pp. 3–4)[5]—the evidence on count 2 left troubling doubts as to the accuracy of the testimony identifying petitioner as the gunman who held up the other store, Phil's Market. All three of the eyewitnesses to the latter holdup, including the two—Mrs. Korn and Joseph Davis, Jr.—who identified petitioner as the gunman, were in agreement that petitioner, when he was brought to the scene in police custody within minutes of the holdup, seemed to have on a different coat from that worn by the would-be robber. Whereas it was definitely established (by the arresting officer's testimony) that petitioner was wearing a waist-length jacket when he was arrested and brought to the scene of the holdup, each of these witnesses testified that the holdup man seemed to be wearing a longer

[5] Even if, in light of the impeachment testimony (*supra,* p. 4), the jury were not wholly satisfied as to the reliability of Miss Hodges' identification testimony, they still had before them the solid testimony of Mrs. McLeish, whose identification of petitioner as the count-1 gunman was in nowise placed in question (*supra,* pp. 3–4). Mrs. McLeish, the evidence showed, had had a particularly good opportunity to observe and remember the face and features of the holdup man.

outer garment—either a "three-quarter coat" or an ordinary overcoat—and one of the three was "positive" that the coats were different (*supra*, pp. 5–6). In view of the shortness of the interval between the holdup and the arrest—ten minutes at the most—this testimony was clearly sufficient to create a reasonable doubt in the jurors' minds as to the accuracy and reliability of the critical identification. A further factor, acknowledged by the prosecution, was that petitioner had no weapon on his person when he was arrested (*supra*, pp. 7–8). While it would have been a simple enough matter for petitioner (assuming he was the gunman) to have discarded the holdup gun somewhere between the market and the point at which he was first observed by the officers (a few blocks away), the jury might reasonably have thought it significant that no evidence was introduced as to the finding of such a weapon along the route between the two points.

B. REVERSAL WOULD BE PARTICULARLY UNWARRANTED IN VIEW OF PETITIONER'S FAILURE TO OBJECT TO THE INSTRUCTION

As previously noted, no objection was made at the trial to the supplemental remarks of the judge, which the petitioner now says were fatally coercive. Ordinarily, under Rule 30 of the Federal Rules of Criminal Procedure,[6] petitioner would therefore have

[6] Rule 30 provides, in relevant part, that "No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection."

been precluded from assigning the statements as error. The court of appeals, while noting petitioner's failure to object, nevertheless "considered the matter" and concluded that, viewed in the context of the whole charge, the challenged statements did not require reversal (R. 53–54). Since the court of appeals thus reached and decided the merits, we do not dispute the proposition that it would be appropriate—Rule 30 notwithstanding—for this Court to reach the merits also. What we do urge is that petitioner's failure to object at the trial is an important factor to be considered in deciding the merits. Obviously an accused who permits an incident at his trial to pass without comment or criticism is in a poor position, after entry of judgment, to base upon it a claim of reversible error. Only if he can meet the stringent test of Rule 52(b)—authorizing notice to be taken (notwithstanding failure to object) of "[p]lain errors * * * affecting substantial rights"—should his tardy challenge be allowed to succeed, and the jury's verdict annulled. For reasons we shall elaborate, this case would, in our view, be an inappropriate one for the application of the "plain error" rationale.

1. Rule 30's insistence that a defendant must object to an error in the instructions at once, before the jury retires to consider its verdict, is obviously no mere "technical" requirement:

> It is a salutary rule, for its purpose is to give the judge an opportunity to make any correction which he thinks is proper and, thus, to minimize the possibility of error. * * * It is

> intended to prevent a litigant from taking advantage, after verdict, of the giving of an erroneous instruction to which he failed to call attention in time to afford the court an opportunity to correct it.

United States v. *Furlong*, 194 F. 2d 1, 3 (C.A. 7), certiorari denied, 343 U.S. 950.[7] If petitioner had objected to the judge's remarks on the ground that they failed to make plain to the jurors the duty of each to adhere at all events to his conscientious convictions, the judge might well have, and in our view almost certainly would have, amended his statement to meet this criticism. The clear rationale of Rule 30 is thus plainly apposite and weighs heavily against petitioner in his present untimely attack on the comments as prejudicially coercive.[8] Cf. *Henry* v. *Mississippi*, No. 6, this Term, decided January 18, 1965, slip opinion, p. 5.

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[7] The *Furlong* case involved, as here, a post-verdict attack on an allegedly coercive instruction. Compare *Allis* v. *United States*, 155 U.S. 117, 122 (involving the same issue): "A party must make every reasonable effort to secure from the trial court correct rulings or such at least as are satisfactory to him before he will be permitted to ask any review by the appellate tribunal; and to that end he must be distinct and specific in his objections and exceptions."

[8] Petitioner's reliance on such cases as *Powell* v. *United States*, 297 F. 2d 318 (C.A. 5) (Pet. Br. 9, 19), in which the challenged supplemental remarks were seasonably objected to (see 297 F. 2d at 320), is accordingly misplaced. Cf. *Huffman* v. *United States*, 297 F. 2d 754, 755 (C.A. 5), certiorari denied, 370 U.S. 955, and *Andrews* v. *United States*, 309 F. 2d 127, 129 (C.A. 5), certiorari denied, 372 U.S. 946, in each of which cases the court, in affirming a conviction based on allegedly coercive instructions, pointed specifically to the accused's failure to object—at the same time rejecting the claim on its merits.

2. Nor would this be a suitable case in which to apply the "plain error" principle. It was manifestly as much in petitioner's interest as the government's that the jury agree on a verdict. The alternative, a "hung" jury, meant a second trial, which might easily go worse from the defense's standpoint than the one then nearly concluded. For example, Miss Hodges, whose identification of petitioner as the count-1 gunman may have been substantially impaired in the minds of the jurors, could not be expected, at a second trial, to leave herself so vulnerable to impeachment (*supra*, p. 4). And the doubt which defense counsel must confidently have believed he had planted in the jurors' minds with respect to petitioner's guilt on count 2 (*supra*, pp. 5–6, 20–21) might not be so readily engendered on a retrial. When, therefore, the jury reported that it could not come to a decision on either count because of "insufficient evidence," petitioner's attorney may well have regarded the development as highly encouraging. While far from a finding of innocence, it indicated that a favorable outcome was at least more likely than a verdict of guilt. Far from taking exception to the court's subsequent remarks, petitioner's counsel sought to capitalize on the situation by requesting a supplemental instruction which would have directed the jury to acquit on both counts if it found the evidence (in the words of the jurors' note) "insufficient" (*supra*, p. 10). When the court properly declined to give the instruction—since the substance of such an instruction had already been given (R. 44)—counsel, still refraining from a request

for modification of the remarks now challenged, permitted the case to go to verdict, without objection, on the instructions as given.

In these circumstances one can hardly conclude that counsel's failure to except was due to mere negligence or lack of alertness. Counsel was well aware, as we have indicated, that there existed sound grounds for the hope that a favorable verdict would be rendered on both counts—an expectation which, indeed, was eventually realized as to one of the counts. It was clear, at least, that the jury was having difficulties with both counts, as its note attested. The more likely explanation for counsel's failure to object, we suggest, was that counsel, anticipating an eventually favorable verdict on both counts, did not wish to jeopardize this outcome by requesting amended instructions calculated to increase the likelihood of a "hung" jury and the attendant necessity for retrial.

An accused who has thus taken his chances on a favorable verdict should not be permitted, when the decision proves not wholly to his liking, to demand a new trial on the basis of an error in the instructions which would have been readily correctible had it been complained of seasonably. Indeed, if petitioner prevails, the result will be that he will be entitled to a retrial on count 1 while retaining his acquittal on count 2—even though his count-2 acquittal was as much the fruit of "coercion" as was his count-1 conviction. As was said in *State* v. *Whitaker*, 275 S.W. 2d 316, 321 (Mo. 1955) (a case involving, as here, a

supplemental instruction claimed to have been objectionably coercive):

> The remarks in this case were at most an irregularity which could have been corrected by the trial judge if the objections of defendants had been brought to the court's attention at the time. But, defendants, in effect, consented to the remarks by making no objection whatever, and took their chance with the jury. They "cannot thus gamble on a favorable verdict" by permitting the trial to go to conclusion without objection, and then contend for the first time in their motion for a new trial that the court committed reversible error.[9]

The question in this case is not whether the jury may be urged to perform its historic role of agreeing on a verdict—this Court, see *infra*, pp. 27–32, has never doubted the propriety of such a charge—but whether the particular instructions here given were fatally defective because of failure to add qualifying words making it indisputably clear that conscientious disagreement is permissible. We do not doubt that the addition of such words would have been desirable. It is our belief, however, that when the charge is viewed in the light of all the surrounding circumstances, including particularly the accused's failure to raise any

[9] Cf. *State* v. *Pyle*, 143 Kans. 772, 782 (1936) (same): "[A] painstaking perusal of the record leaves this court under the impression that defendant's counsel did not regard the instruction as unfavorable to his client at the time it was given. Be that as it may, there is an elementary rule of appellate practice which is that counsel cannot sit quietly by and permit the trial court to commit error prejudicial to his client without the interposition of a timely and appropriate objection thereto."

objection, an inference that it was significantly coercive is not warranted.

II

THERE IS NO OCCASION FOR THE COURT IN THIS CASE TO REEXAMINE THE VALIDITY OF THE *ALLEN* CHARGE

Petitioner, in addition to challenging as prejudicially coercive the particular supplemental remarks made to the jury in this case, asks the Court to reexamine its decision in *Allen* v. *United States*, 164 U.S. 492, 501–502, in which it approved the instruction which has since come to be widely known as the *Allen* charge[10] (Pet. Br. 6–16). The right of an accused under the Constitution to be tried by a fair and impartial jury, it is said, carries with it the right "to have [the] jury disagree," and the *Allen* charge infringes this right since the purpose of the instruction is to "facilitate agreement" (Pet. Br. 6). There is, however, clearly no occasion for the Court in this case to reexamine the *Allen* decision or the validity of the instruction there approved. For the challenged statements here in issue, as noted by the court below (R. 54), "did not in any sense purport to be the [*Allen*] charge." That charge, indeed, was not mentioned at the trial by anyone.

The *Allen* instruction was taken literally from a charge approved by the Supreme Court of Massa-

[10] See, also, *Allis* v. *United States*, 155 U.S. 117, 120–123, affirming *United States* v. *Allis*, 73 Fed. 165, 182–183 (C.C.E.D. Kans.). The charge given in that case (73 Fed. at 182–183) was substantially the same as the instruction in the later *Allen* case. However, the relevant language of the charge was apparently not before this Court in *Allis* (see 155 U.S. at 121).

chusetts in *Commonwealth* v. *Tuey,* 8 Cush. 1 (1851), where it appears at pages 2–3. As summarized by this Court in the *Allen* opinion (at p. 501), the charge stated:

> that in a large proportion of cases absolute certainty could not be expected; that although the verdict must be the verdict of each individual juror, and not a mere acquiescence in the conclusion of his fellows, yet they should examine the question submitted with candor and with a proper regard and deference to the opinions of each other; that it was their duty to decide the case if they could conscientiously do so; that they should listen, with a disposition to be convinced, to each other's arguments; that, if much the larger number were for conviction, a dissenting juror should consider whether his doubt was a reasonable one which made no impression upon the minds of so many men, equally honest, equally intelligent with himself. If, upon the other hand, the majority was for acquittal, the minority ought to ask themselves whether they might not reasonably doubt the correctness of a judgment which was not concurred in by the majority.

It is apparent from a comparison between that instruction and the obviously extemporaneous remarks of the court here in issue that the two statements have little in common. There was no reference, for example, in the court's comment in this case to the fact that the jurors' duty to join in a verdict was binding only insofar as they could do so "conscientiously"—a key aspect of the *Allen* charge—nor

to any of the other carefully phrased considerations mentioned in that instruction. The instruction here in issue must, it is clear, stand or fall on its own merits. Even if the Court should conclude, in other words, that the judge's comments at the instant trial were vulnerable (despite the absence of objection), there would be no reason for the Court in this case to reconsider the historic *Allen* instruction proper.

In any event that classic charge, in the carefully worded form in which it received this Court's unanimous approval, is, we submit, a suitable method, when used in appropriate circumstances and in the sound discretion of the trial court, for reminding jurors of their duty to decide the case before them if it is possible for them to do so consistently with their conscientious convictions. First sanctioned by the Court in 1896, the instruction has been specifically reaffirmed and re-approved on at least two occasions, most recently in 1952. *Lias* v. *United States*, 284 U.S. 584 (1931), affirming 51 F. 2d 215, 218 (C.A. 4); *Kawakita* v. *United States*, 343 U.S. 717, 744 (1952), affirming 190 F. 2d 506, 521–528 (C.A. 9).[11] Notwith-

[11] In *Lias*, the court of appeals had upheld a supplemental charge "substantially" similar to the *Allen* charge (51 F. 2d at 218). This Court, on writ of certiorari "limited to the question raised by the supplemental charge to the jury" (284 U.S. 604), affirmed the lower court's judgment *per curiam*, simply citing the *Allen* decision (284 U.S. 584).

In *Kawakita*, the lower court had similarly upheld a supplemental charge substantially like the *Allen* instruction (190 F. 2d at 521–528). Although the use of the instruction w[illegible] one of the alleged errors relied on for reversal (Brief for Pe-

standing a few recent critical references to the *Allen* charge by some of the judges of the Fifth and District of Columbia Circuits,[12] it has been generally and repeatedly approved by the lower federal courts,[13] and has been endorsed in terms or in substance by an over-

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titioner, No. 570, Oct. Term, 1951, pp. 160–169), this Court disposed of the contention by grouping it with others and saying that all were "either insubstantial or so adequately disposed of by the Court of Appeals that we give them no notice" (343 U.S. at 744).

[12] See *Huffman* v. *United States*, 297 F. 2d 754, 759 (C.A. 5), certiorari denied, 370 U.S. 955 (Brown, J., dissenting); *Green* v. *United States*, 309 F. 2d 852, 854, n. 3 (C.A. 5) (*dictum*); *Campbell* v. *United States*, 316 F. 2d 681, n. 1 (C.A.D.C.) (*dictum*). And see the dissent below, at R. 56.

[13] Some of the more recent decisions have been: *Estes* v. *United States*, 335 F. 2d 609, 618–619 (C.A. 5), certiorari denied January 18, 1965, No. 601, this Term; *United States* v. *Kahaner*, 317 F. 2d 549, 483–485 (C.A. 2), certiorari denied, 375 U.S. 836; *Andrews* v. *United States*, 309 F. 2d 127, 129 (C.A. 5), certiorari denied, 372 U.S. 946; *United States* v. *Rogers*, 289 F. 2d 433, 434–437 (C.A. 4); *Wegman* v. *United States*, 272 F. 2d 31, 35 (C.A. 8); *Anderson* v. *United States*, 262 F. 2d 764, 773–774 (C.A. 8), certiorari denied, 360 U.S. 929; *Hagans* v. *United States*, 261 F. 2d 924, 927–928 (C.A. 5), certiorari denied, 359 U.S. 967; *Christy* v. *United States*, 261 F. 2d 357, 361 (C.A. 9), certiorari denied, 360 U.S. 919; *Costello* v. *United States*, 255 F. 2d 389, 398 (C.A. 8), certiorari denied, 358 U.S. 830; *Kleven* v. *United States*, 240 F. 2d 270, 273 (C.A. 8); *Hutson* v. *United States*, 238 F. 2d 167, 172–174 (C.A. 9); *Wolin* v. *United States*, 211 F. 2d 770, 772 (C.A. 4), certiorari denied, 348 U.S. 819; *United States* v. *Gordon*, 196 F. 2d 886, 891–892 (C.A. 7), reversed on other grounds, 344 U.S. 414; *United States* v. *Furlong*, 194 F. 2d 1, 2–4 (C.A. 7), certiorari denied, 343 U.S. 950; *Wright* v. *United States*, 175 F. 2d 384, 388 (C.A. 8), certiorari denied, 338 U.S. 873; *United States* v. *Samuel Dunkel & Co.*, 173 F. 2d 506, 508–509 (C.A. 2); *Speak* v. *United States*, 161 F. 2d 562, 564–565 (C.A. 10); *Bowen* v. *United States*, 153 F. 2d 747, 751 (C.A. 8), certiorari

whelming majority of the States which have had occasion to consider it or a similar charge.[14]

Since "[t]he very object of the jury system is to secure unanimity by a comparison of views, and by arguments among the jurors themselves," as the Court observed in the *Allen* case itself, it "certainly cannot be the law that each juror should not listen with deference to the arguments and with a distrust of his own judgment, if he finds a large majority of the jury taking a different view of the case from what he does himself," nor that "each juror should go to the jury-room with a blind determination that the verdict shall represent his opinion of the case at that moment * * *." 164 U.S. at 501. Human nature being what it is, moreover, there is a danger that some jurors, having once expressed their view of the case in the jury room, may find it psychologically difficult, due to pride or obstinacy, to withdraw from this position subsequently—even though they might honestly come to believe, on the basis of arguments advanced by their fellow jurors, that their

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denied, 328 U.S. 835; *Bord* v. *United States*, 133 F. 2d 313, 315 (C.A.D.C.), certiorari denied, 317 U.S. 671; *Culp* v. *United States*, 131 F. 2d 93, 101 (C.A. 8); *Weathers* v. *United States*, 126 F. 2d 118, 119–120 (C.A. 5), certiorari denied, 316 U.S. 681; *Boehm* v. *United States*, 123 F. 2d 791, 812 (C.A. 8), certiorari denied, 315 U.S. 800; *Coupe* v. *United States*, 113 F. 2d 145, 149 (C.A.D.C.), certiorari denied, 310 U.S. 651; *Hewitt* v. *United States*, 110 F. 2d 1, 10 (C.A. 8), certiorari denied, 310 U.S. 641. Cases from every circuit are collected in *United States* v. *Tomoya Kawakita*, 96 F. Supp. 824, 857, n. 6 (S.D. Cal.), affirmed, 190 F. 2d 506 (C.A. 9), affirmed, 343 U.S. 717.

[14] See Appendix, *infra*, pp. 33–37.

initially expressed view is no longer defensible. The very act of reaching a verdict in a criminal case, furthermore, is a duty which many jurors, loath to assume responsibility for another man's fate, would undoubtedly prefer to shirk. The *Allen* instruction is designed to meet these and similiar contingencies. It combines, in appropriately balanced fashion, a reminder to the jurors of their duty to decide the case before them, if it is humanly possible to do so, and an explicit *caveat* that the verdict must at the same time reflect the true views of each, conscientiously arrived at.

The effective functioning of a jury system obviously requires that cases be decided. The *Allen* charge represents a fair accommodation between society's and the accused's common interest in the avoidance, so far as possible, of a "hung" jury—which decides nothing and requires retrial—and the parties' similarly shared concern that the verdict be *truly* unanimous.

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the court of appeals should be affirmed.

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APPENDIX

STATE DECISIONS WHICH HAVE APPROVED *ALLEN*-TYPE INSTRUCTIONS

Allen-type instructions[1] have been approved in at least 32 states.[2] See, *e.g.*, *Bufkins* v. *State*, 20 Ala. App. 457, 460–461 (1924), certiorari denied *sub nom. Ex parte Bufkins*, 212 Ala. 638 (1925); *Chase* v. *State*, 369 P. 2d 997, 1004–1005 (Alaska 1962); *McGaha* v. *State*, 216 Ark. 165, 172 (1949); *People* v. *Baumgartner*, 166 Cal. App. 2d 103, 105–108 (1958); *Sevilla* v. *The People*, 65 Colo. 437, 441–442 (1918), reaffirmed in *Mills* v. *People*, 146 Colo. 457, 462–463 (1961), certiorari denied, 369 U.S. 841; *State* v. *Walters*, 145 Conn. 60, 62–64 (1958), appeal dismissed, 358 U.S. 46; *State* v. *Maclary*, 193 A. 2d 195 (Del. 1963); *Yancy* v. *State*, 173 Ga. 685, 689–692 (1931); *State* v. *Tope*, 86 Idaho 462, 468–469 (1963); *State* v. *Bogardus*, 188 Iowa 1293, 1298–1301 (1920); *Abbott* v. *Commonwealth*, 352 S.W. 2d 552, 554 (Ky. 1961); *State* v. *Dudoussat*, 47 La. Ann. 977, 998–999 (1895); *State* v. *Pike*, 65 Me. 111, 116 (1876); *Commonwealth* v. *Tuey*,

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[1] By this term we mean, in general, supplemental instructions given to disagreeing jurors, urging them to harmonize their differences and join in a verdict if possible. The particular phraseology of such instructions has differed widely from State to State and from case to case. In a substantial number of the cases cited in the list which follows (between a third and a half), the charge was patterned closely after the original *Tuey* charge (*Commonwealth* v. *Tuey*, 8 Cush. (Mass.) 1, 2–3 (1851)), the prototype of the instruction approved in the *Allen* case (*Allen* v. *United States*, 164 U.S. 492, 501).

[2] There may well be others. Our study of the State decisions has not been exhaustive.

8 Cush. (62 Mass.) 1, 2–4 (1851), reaffirmed in *Highland Foundry Co.* v. *New York, New Haven, and Hartford Railroad Co.*, 199 Mass. 403, 407 (1908), and *Commonwealth* v. *Hassan*, 235 Mass. 26, 33 (1920); *People* v. *Chivas*, 322 Mich. 384, 392–395 (1948); *State* v. *Doan*, 225 Minn. 193, 202–206 (1947); *State* v. *Bozarth*, 361 S.W. 2d 819, 826 (Mo. 1962); *State* v. *Williams*, 39 N.J. 471, 481–485 (1963), certiorari denied, 374 U.S. 855; *Territory* v. *Donahue*, 16 N.M. 17, 26–28 (1911), reaffirmed in *State* v. *Horton*, 57 N.M. 257, 261–262 (1953); *State* v. *Pugh*, 183 N.C. 800, 802 (1922); *Montgomery* v. *State*, 19 Okla. Cr. 224, 227–229 (1921); *State* v. *Butler*, 96 Ore. 219, 237–242 (1919); *Commonwealth* v. *Campbell*, 116 Pa. Super. 180, 189 (1935); *State* v. *Scott*, 123 Atl. 292 (R.I. 1924); *State* v. *Pulley*, 216 S.C. 552, 555–557 (1950); *State* v. *Egland*, 23 S.D. 323, 326–328 (1909); *Simmons* v. *State*, 198 Tenn. 587, 594–596 (1955); *Rippetoe* v. *State*, 67 Tex. Cr. 192, 196–197 (1912); *State* v. *Gorham*, 67 Vt. 365, 371–372 (1894); *State* v. *Thomas*, 63 Wash. 2d 59, 65–67 (1963); *Boyd* v. *State*, 217 Wis. 149, 158–159 (1935); *Nicholson* v. *State*, 24 Wyo. 347, 356–358 (1916). Cf. *People* v. *Faber*, 199 N.Y. 256, 260–261 (1910) (*dictum*).

In only three States, to our knowledge—Arizona, Kansas, and Montana—has an instruction patterned substantially after the *Allen* charge been disapproved. *State* v. *Thomas*, 86 Ariz. 161 (1959); *Eikmeier* v. *Bennett*, 143 Kans. 888 (1936); *State* v. *Randall*, 137 Mont. 534, 540–542 (1960).[3]

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[3] In *Counts* v. *Commonwealth*, 137 Va. 744, 747–750 (1923), the court, while approving generally the idea of a supplemental charge designed to encourage disagreeing jurors to concur in a verdict by discouraging obstinacy and pride of opinion, held reversibly erroneous an instruction whose thrust, aimed at the minority of the jurors, suggested that the view of the

In *State* v. *Thomas, supra,* the Arizona Supreme Court acknowledged that the instruction (referred to in that State as the "Voeckell" instruction, after *State* v. *Voeckell,* 69 Ariz. 145 (1949), where it was originally *approved*) contains no "misstatement of the law" (86 Ariz. at 166). Noting, however, that the charge had been before the court four times, that in each instance the propriety of its use had depended on the facts and circumstances of the particular case, and that its continued employment would cause "harassment and distress in the administration of justice," the court ruled that the instruction would no longer be sanctioned (*ibid.*). The court, nevertheless, subsequently affirmed a conviction in which the "Voeckell" instruction had (prior to the *Thomas* decision) been given. *State* v. *Evans,* 88 Ariz. 364, 373–374 (1960), certiorari denied, 371 U.S. 835.

Although the Kansas Supreme Court, in *Eikmeier* v. *Bennett, supra,* a civil case, expressed general disapproval of *Allen*-type instructions, it noted, in a contemporaneously decided criminal case, that it had seldom held the giving of such an instruction to be so prejudicially erroneous as to require reversal. *State* v. *Pyle,* 143 Kans. 772, 781 (1936). In the latter case,

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majority was more likely to be the correct one. Citing an earlier Virginia decision to the effect that it is the duty of jurors to discuss the evidence with open minds and to agree on a verdict, if possible, without sacrificing conscientious convictions, the court said that "this means that the views of a minority, as well as the views of the majority of the jurors, should be given careful consideration by their fellows" (137 Va. at 748). Virginia would thus, presumably, disapprove of that aspect of the *Allen* charge which suggests that where "much the larger number" of the jurors are of one view the jurors in the minority should ask themselves whether their view might not be incorrect in view of its failure to impress the majority.

the court refused to disturb a verdict of guilt returned after the giving of such a charge—partly on the ground that the instruction had not been objected to. And in *State* v. *Neff*, 169 Kans. 116, 125–129 (1950), certiorari denied, 340 U.S. 866, the court again declined to reverse a conviction resulting from such an instruction—even though there the accused had objected.

In *Leech* v. *People*, 112 Colo. 120 (1944), referred to by petitioner at Pet. Br. 14, the court alluded to the *Allen* charge as having been "*sometimes facetiously referred to* as the third degree [instruction]" (emphasis added) (112 Colo. at 123). The opinion made it explicitly clear, however, that the charge had been "carefully considered and approved by this court" (*ibid.*). See, also, *Mills* v. *People*, 146 Colo. 457, 462–463 (1961), certiorari denied, 369 U.S. 841, a later Colorado decision, cited above.

The New Mexico Supreme Court's reference to the *Allen* charge as "the shotgun instruction" (*State* v. *Nelson*, 63 N.M. 428, 431 (1958), certiorari denied, 361 U.S. 877, cited by petitioner at Pet. Br. 14) was made in the context of a case in which the charge had gone far beyond the *Allen* instruction proper. New Mexico approves the *Allen* instruction in its unembellished form *State* v. *Horton*, 57 N.M. 257, 261–262 (1953), reaffirming *Territory* v. *Donahue*, 16 N.M. 17, 26–28 (1911), both cited *supra*.

Petitioner's statement that the courts of Idaho and Wisconsin have discouraged the use of the *Allen* charge (Pet. Br. 14) is incorrect. The instruction criticized in *State* v. *Moon*, 20 Idaho 202, 220–222 (1911), cited by petitioner, was a slanted version of the charge, so phrased that it left the impression that the judge had taken it for granted that the majority of the jury were for conviction. The Wisconsin decisions cited are not in point, most having to do with

an instruction—not part of the *Allen* charge—calling the jury's attention to the expense of another trial. Indeed, in one of the decisions, *Secor* v. *State,* 118 Wis. 621 (1903), the instruction challenged was specifically declared to be—aside from the reference to expense—"unexceptionable" (118 Wis. at 637–638). See, also, *Boyd* v. *State,* 217 Wis. 149, 158–159 (1935), cited *supra.*

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SUPREME COURT OF THE UNITED STATES

No. 761.—October Term, 1964.

Melvin C. Jenkins, Petitioner, *v.* United States.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[April 5, 1965.]

Per Curiam.

Petitioner was charged in a two-count indictment in the United States District Court for the District of Columbia, with robbing a High's Dairy Products store on December 27, 1962 (count 1), and with assault with intent to rob upon the proprietress of a grocery store on January 24, 1963 (count 2), in violation of §§ 22–2901 and 22–501, respectively, of the District of Columbia Code. Following a trial by jury, he was found guilty on count 1 and not guilty on count 2. He was sentenced to imprisonment for from three to 10 years. A divided Court of Appeals affirmed the conviction, 330 F. 2d 220. A petition for rehearing *en banc* was denied, four judges dissenting.

Slightly more than two hours after the jury retired to deliberate, the jury sent a note to the trial judge advising that it had been unable to agree upon a verdict "on both counts because of insufficient evidence." The judge thereupon recalled the jury to the courtroom and in the course of his response stated that "You have got to reach a decision in this case." We granted certiorari, — U. S. —, to consider whether in its context and under all the circumstances of this case the statement was coercive. The Solicitor General in his brief in this Court stated:

> "Of course, if this Court should conclude that the judge's statement had the coercive effect attributed

to it, the judgment should be reversed and the cause remanded for a new trial; the principle that jurors may not be coerced into surrendering views conscientiously held is so clear as to require no elaboration."

Upon review of the record, we conclude that in its context and under all the circumstances the judge's statement had the coercive effect attributed to it. Accordingly the judgment of the Court of Appeals is reversed and the cause remanded for a new trial. Cf. *Brasfield* v. *United States*, 272 U. S. 448, 450; *Burton* v. *United States*, 196 U. S. 283, 307–308; *United States* v. *Rogers*, 289 F. 2d 433, 435 (C. A. 4th Cir.)

It is so ordered.

MR. JUSTICE CLARK and MR. JUSTICE HARLAN, dissent.